IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-6516

CHARLES D. BRADEN,

Petitioner,

v.

30th JUDICIAL CIRCUIT COURT OF KENTUCKY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Miscellaneous:

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OPINIONS BELOW

The opinion of the Court of Appeals (App. 8) is reported at 454 F.2d 145 (6th Cir. 1972). The District Court issued a memorandum opinion and order which is not reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on January 18, 1972 (App. 0000). The petition for a writ of certiorari was filed on April 15, 1972, and was granted on June 12, 1972. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether a petition for a writ of habeas corpus asking for relief pursuant to 28 U.S.C. §2241 may only be brought in the judicial district in which the petitioner resides.

2. Whether a state prisoner's petition for a writ of habeas corpus asking for relief pursuant to 28 U.S.C. §2241 and seeking a speedy trial or dismissal of an indictment outstanding in a foreign state court may be brought in the district court embracing that state respondent.

3. Whether the "within their respective jurisdictions" language of 28 U.S.C. §2241(a) refers to the territorial presence of a habeas corpus petitioner or his respondent.

STATUTE INVOLVED

This case involves an interpretation of 28 U.S.C. §2241, which provides:

Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be

entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless–

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the

judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

STATEMENT OF THE CASE

Petitioner Braden is presently incarcerated in an Alabama state prison and is seeking the alternative relief of a speedy trial or dismissal of a Kentucky state indictment pursuant to which Kentucky authorities have filed a detainer with his Alabama warden (App. 3, 8). Kentucky is refusing to bring him to trial until his Alabama sentence has been served and Petitioner is therefore seeking habeas corpus relief in the federal courts. This case presents a matter of jurisdiction only. The facts have not been disputed and are presented in the petition for habeas corpus (App. 3) and in the findings made from the record by the district court judge as stated in the district court opinion (App. 8).

On or about July 31, 1967, the grand jury of the Jefferson County Circuit Court (30th Judicial Circuit of Kentucky) returned a two-count indictment, No. 135047, charging Petitioner with storehouse-breaking and safe-breaking (App. 3, 8). Pursuant to this indictment, Petitioner was brought from California to Kentucky,

whence he escaped on November 13, 1967 (App. 3, 8). He was subsequently arrested in Alabama and convicted of felonies there (App. 4, 8). Petitioner Braden is presently imprisoned in the Alabama State Penitentiary (App. 8) serving his second Alabama sentence, a ten-year sentence which began to run in March, 1972. A detainer was lodged against him by the Jefferson County officials in 1968 based on the charges in the Kentucky indictment (App. 4, 8). This detainer is still in effect.

Petitioner has made numerous requests for speedy trial on the outstanding Kentucky indictment. In February, 1969, he filed a demand in the Jefferson County, Kentucky Circuit Court (App. 4, 8) with a copy to the prosecuting attorney (App. 4). Kentucky took no action on his speedy trial demand (App. 4). He again demanded trial in December, 1969, but the respondent Court denied his motion to quash the indictment or return Petitioner for trial (App. 4). In October, 1970, the Kentucky Court of Appeals (the highest Kentucky state court) denied Braden's petition for mandamus to force the respondent Jefferson County authorities either to request his return for trial or to dismiss the indictment (App. 4, 8).

Failing to gain the relief in the state courts, Petitioner Braden then sought federal relief. He is incarcerated in Alabama, embraced by the United States Court of Appeals for the Fifth Circuit, and seeks a trial in Kentucky, embraced by the United States Court of Appeals for the Sixth Circuit. On November 27, 1970, he filed a petition for a writ of habeas corpus ad subjiciendum in the United States District Court for the Western District of Kentucky at Louisville (App. 3), the district embracing the respondent Jefferson County Circuit Court. Braden was without counsel in the action.

The petition, filed pursuant to 28 U.S.C. §2241(c)(3) and 28 U.S.C. §2254, alleged (1) that Petitioner was being deprived of his constitutional right to a speedy trial because of the refusal of Kentucky authorities to seek his return from Alabama for trial on the then three-year old Kentucky indictment, (2) that delay would impair his right to defend himself, and (3) that his Alabama prison term was adversely affected by the detainer (App. 4, 5).

The District Court issued a show cause order on December 10, 1970, and the Kentucky Attorney General filed a brief response arguing that the court was without jurisdiction because Petitioner was not within the district (App. 6)

In an opinion filed February 26, 1971, the district court interpreted *Smith v. Hooey*, 393 U.S. 374 (1969), as holding that the state had a duty to bring Petitioner Braden to trial and that Braden's unsuccessful demands for that trial were reviewable under federal standards. The district court then concluded that it had jurisdiction since it is the State of Kentucky, not Alabama, "which must take action" (App. 9). The court found that Petitioner was being denied a speedy trial by the State and ordered that the respondent court officials either secure Petitioner for trial within sixty days or dismiss the indictment (App. 9).

The United States Court of Appeals for the Sixth Circuit recognized that Braden had a present right, under *Peyton v. Rowe*, 391 U.S. 54 (1968), to challenge his denial of a speedy trial but reversed the district court solely on the ground that the district court lacked jurisdiction (App. 11, 12). The Sixth Circuit had very recently decided in *White v. Tennessee*, 447 F.2d 1354 (6th Cir. 1971), that such petitions could only be

brought in a district holding the prisoner's person. The Sixth Circuit Court of Appeals expressed its reluctance in reaching its decision because the split of opinions in the circuits might leave Petitioner without a remedy for the deprivation of his constitutional rights, recognizing that the rule in the Fifth Circuit, where Petitioner Braden is incarcerated, appears to be that a district court in the state that has filed the detainer is the proper forum in which to file the petition. 454 F.2d 145 at 146. (App. 12).

Petitioner now seeks relief in this Court and asks that the Court declare that the district out of which the detainer has issued is a district within which he may bring his action to enforce his constitutional right to a speedy trial.

SUMMARY OF ARGUMENT

Ahrens v. Clark, 335 U.S. 188 (1948), stands apart from and is antithetical to recent decisions of the Court which extend constitutional inquiry on petitions for a writ of habeas corpus to future restraints and which entertain claims under circumstances once thought premature. The rule of *Ahrens*—that habeas petitions may only be brought in the district of petitioner's confinement—cannot be squared with subsequent decisions which necessarily contemplate circumstances in which the focus of petitioner's grievance, perhaps a trial yet to stand or a sentence yet to serve, and the person against whom he grieves are each to be found outside the district within which he is confined. The language, legislative history, and purpose of the statute which *Ahrens* construes lend support to a conclusion that it is the presence of the custodian/respondent rather than that of

the prisoner/petitioner which is essential for jurisdiction. Further, recent decisions of the Court delineating the degree of custodial presence necessary to support habeas process present opportunity for forum choices which can greatly serve both judicial efficiency and the ends of justice. *Ahrens* at least represents the potential to thwart such progress; at worst, it stands as a rigid barrier. The rule of *Ahrens* should not be extended, as it was below, to a class of petitioners seeking a mode of relief that was not available at the time the rule was formulated.

ARGUMENT

THE CONSTRUCTION OF 28 U.S.C. §2241 THAT WAS WORKED IN *AHRENS V. CLARK* FRUSTRATES JURISDICTIONAL CHOICES THAT ARE CONSISTENT WITH THE SCOPE OF CONSTITUTIONAL INQUIRY UPON HABEAS CORPUS PETITIONS. SUCH CONSTRUCTION SHOULD BE LIMITED, IF NOT ABANDONED, AS CONTRARY TO THE LANGUAGE, HISTORY, AND PURPOSE OF THE STATUTE.

The rule of *Ahrens v. Clark*, 335 U.S. 188 (1948), has occasioned no small amount of jurisdictional confusion in the wake of recent extentions of the availability of the Great Writ to habeas petitioners complaining of restraints imposed upon them from the distance of both time and place. The reservations expressed by Justice Rutledge, writing for himself and for Justices Murphy and Black in the *Ahrens* dissent, have matured into especial contemporary pertinence. Justice Rutledge foresaw that the Court, in holding that district courts lack jurisdiction to order writs of habeas corpus when the petitioner is not physically present within the district, had enacted a "strict jurisdictional limitation which can only defeat the

writ's efficacy in many cases where it may be most needed" and warned that "the full ramifications of the decision are difficult to foresee." *Ahrens v. Clark*, 335 U.S. at 210 and 195 (1948) (Rutledge, J., dissenting). Although Petitioner's jurisdictional plight may not itself exhaust the "full ramifications" of *Ahrens*, as he views the rule from Edmond Cahn's "consumer perspective",[1] part of its impact is unmistakable: he will at least be denied the habeas forum in which he has already prevailed on the merits of his constitutional claim, and he may well be left without a forum at all.[2]

The federal district court below found on the authority of *Smith v. Hooey*, 393 U.S. 374 (1969), that

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[1] *E. Cahn, Confronting Injustice* (1967).

[2] The circuit, below, *Braden v. 30th Judicial Circuit Court*, 454 F.2d at 146-147 (6th Cir. 1972) put it well when it stated:

> We reach this conclusion reluctantly because we observe that this decision possibly will result in Braden's inability to find a forum in which to assert his constitutional right to a speedy trial—a right which he is legally entitled to assert at this time under *Peyton v. Rowe*, 391 U.S. 54 (1968). This is a possibility because the rule in the Fifth Circuit, where appellee is incarcerated, appears to be that a district court in the state that has filed the detainer is the proper forum in which to file the petition. See *May v. Georgia*, 409 F.2d 203 (5th Cir. 1969), see also *Rodgers v. Louisiana*, 418 F.2d 237 (5th Cir. 1969).

The court continued on to observe that Petitioner may therefore find himself ensnared in what has aptly been called "Catch 2254." Id. *See* Tuttle, *Catch 2254: Federal Jurisdiction and Interstate Detainers*, 32 U. Pitt. L. Rev. 489, 502-03. *See also United States ex rel. Pitcher v. Pennsylvania*, 314 F. Supp. 1329 (E.D. Pa. 1970).

The United States Court of Appeals for the Sixth Circuit thus relegated Petitioner to a forum which might not be available to him at all, and whose availability would be predicated upon the fact that Kentucky authorities have lodged a detainer against Petitioner. If there were no detainer, Petitioner would still be seeking relief from the untried indictment.

Petitioner's right to a speedy trial was and is being denied by Kentucky state authorities. The district court was reversed by the Court of Appeals for the Sixth Circuit on the ground that the district court lacked jurisdiction to issue a writ of habeas corpus "when the petitioner is not in physical custody within the forum state." 454 F.2d 145 at 146. In so doing, Petitioner argues, the circuit court has extended the *Ahrens* already strict jurisdictional interpretation of the habeas corpus statutes to a class of habeas applicants who appear not to have been considered by the Court at the time *Ahrens* was decided, who were certainly not envisioned by legislators in 1867 when they enacted the statute *Ahrens* interprets, and who at the time of the most recent amendments to the statute had not yet been afforded by decision the right to seek habeas relief.

Ahrens was a case involving 120 German citizens held on Ellis Island in New York to await deportation after World War II. They petitioned the district court in the District of Columbia for a writ of habeas corpus, naming the Attorney General as respondent. 335 U.S. at 189. Apparently petitioners could have filed an action in the district court of their confinement, naming their immediate Ellis Island custodian as respondent, but chose not to. Thus when the Court denied their petition on the ground that the habeas statute in effect at that time limited district courts to hearing petitions of those confined within their territorial jurisdictions, 335 U.S. at 192, the *Ahrens* petitioners were not left without a remedy, but were merely sent to another district court. The majority in *Ahrens*, speaking through Mr. Justice Douglas, felt that both the history of the statute and questions of policy compelled them to construe the statute thus. 335 U.S. at 191:

The statutory construction that was worked in *Ahrens* was of 28 U.S.C. 452, as it then stood, the predecessor to the current habeas statute, providing that Supreme Court justices and judges of circuit and district courts "*within their respective jurisdictions*, shall have power to grant writs of habeas corpus . . ." [Emphasis added.] The italicized phrase was first inserted in the habeas corpus statute of 1867, 14 Stat. 385, and, since the operative language had remained unchanged, the *Ahrens* Court looked to the early legislative history. In so doing the majority concluded, largely upon a single statement made by Senator Revedy Johnson when the bill was on the floor of the Senate in 1867, that Congress had meant to limit jurisdiction to the court embracing the place where petitioner was confined when it had amended the proposed statute to add the phrase "within their respective jurisdictions." Following the amendment the 1867 statute read:

> "That the several courts of the United States and the several justices and judges of such courts, within their respective jurisdictions, . . . shall have power to grant writs of habeas corpus . . ." 14 Stat. 385 (1867).

When the entire discussion in the House of Representatives and the Senate is analyzed, it becomes extremely doubtful that Congress meant to limit jurisdiction so severely or that they meant the phrase to apply to the location of the prisoner rather than to the location of the custodian.[3] The language of the statute and of the

[3] The bill was H.R. 605, 39th Cong., 1st Sess., discussed and passed in the House of Representatives July 25, 1866. Cong. Globe, 39th Cong., 1st Sess. 4150-4151. Senate approval came on January 28, 1867, with the addition of the phrase "within their respective jurisdictions" after discussion that day and on January 25,

minutes of discussion are at least equally consistent with a conclusion that it was the location of the custodian and the reach of the court's process to the respondent which was at issue.

The purpose of the unamended bill introduced into the House was, according to Representative Lawrence who presented the bill on the floor from the Committee on the Judiciary,

> "to enlarge the privilege of the writ of *habeas corpus*, and make the jurisdiction of the courts and judges of the United States coextensive with all the powers that can be conferred upon them. It is a bill of the largest liberty, and does not interfere with persons in military custody, or restrain the writ of *habeas corpus* at all . . ." Cong. Globe, 39th Cong., 1st Sess. 4151 (1866).

The bill (and the statute) speaks of the writ being directed not to the petitioner but to the custodian: "Said writ shall be directed to the person in whose custody the party is detained . . ."[4] The reach of that process is what

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1867. Cong. Globe, 39th Cong., 2d Sess. 730 and 790. The House then agreed to the amendment. Cong. Globe, 39th Cong. 2d Sess. 899. The entire bill as presented to the Senate is set out at Cong. Globe, 39th Cong., 2d Sess. 730. The bill was a result of a House resolution instructing the judiciary committee to propose enabling legislation for United States courts to enforce the freedom of wives and children of United States soldiers and the liberty of all persons. Cong. Globe, 39th Cong., 1st Sess. 4151. Such freedom had been guaranteed soldiers for their families as an inducement to enlist. For a thorough examination of the history of the statute *see* Fairman, *New Problems of the Constitution Following the Flag*, 1 Stan. L. Rev. 587 at 631-643 (1949).

[4] H.R. 605, 39th Cong., 1st Sess. (1866); Act of Feb. 5, 1867, 14 Stat. 385.

was then discussed in the Senate by Senator Revedy Johnson. Cong. Globe, 39th Cong., 2d Sess. 730 (1867). He spoke of his agreement with the late Chief Justice Taney's view that "this kind of process issued by any judge of the Supreme Court of the United States could be sent anywhere within the limits of the United States, and would of course be compulsory upon the party to whom it was directed," but pointed out that Chief Justice Chase had very recently expressed the contrary view, that Supreme Court justices would issue writs only to custodians in their own circuits.[5]

Senator Johnson saw a problem in that he interpreted the bill as permitting a district judge in a district having no connection with *either* the petitioner or his custodian to bring before him prisoners "convicted and sentenced and held" in distant states, contrary to Chief Justice Chase's feelings. The bill was put over for the next day by Senator Trumbull. Cong. Globe, 39th Cong. 2d Sess. 790.

On January 28 when the bill was taken up again, Senator Trumbull proposed amending the bill by adding the phrase "within their respective jurisdictions." He noted however that he thought the language redundant as he did not think the bill susceptible to the construction

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[5] Senator Johnson's interest in the inquiry is detailed in Fairman, *New Problems of the Constitution Following the Flag*, 1 Stan. L. Rev. 587 at 637-38 (1949). Five weeks before his remarks on the Senate floor, Senator Johnson had made application before Chief Justice Chase for a writ of habeas corpus on behalf of Dr. Samuel A. Mudd, one of Booth's accomplices in the assassination of President Lincoln. New York Herald, Dec. 20, 1866. States Fairman: "No report of Chase's opinion has been found; but he denied the petition, and it was Johnson's understanding that this was on the view that a Justice had no power to issue the writ to be executed outside the circuit to which he was assigned." Id. at 638.

suggested by Senator Johnson. Just before the amended bill passed, Senator Johnson explained again that he had suggested amendment because he had been concerned with the extent of the reach of process of the judges, particularly with where the custodian to whom the writ should be directed was located:

> I suggested the necessity of an amendment the other day because I know that the late Chief Justice of the United States decided that under the laws as they stand process issued by a judge of the Supreme Court in cases where these judges have a right to issue process extends all over the Union. That I am satisfied might lead to a practical evil. The amendment proposed by the honorable chairman is entirely satisfactory to me and removes that difficulty. Cong. Globe, 39th Cong., 2d Sess. 790.

The amended bill was then sent to the House where it passed with only one comment:

> Mr. Wright: I would ask whether anybody in this House, when he gives his vote on these amendments, knows what he is voting upon? [Laughter.] Cong. Globe, 39th Cong., 2d Sess. 899.

Thus, the legislative history bespeaks a concern with the efficacy of the writ once issued, measured in terms of properly reaching the custodian against whom complaint is made. Requiring the presence of the petitioner within the territorial limits of the court issuing the writ was and is unnecessary to cure any potential for jurisdictional abuse. The legislative history is not only *as supportive* of the view that it was the custodian's presence which was thought critical, but, as Professor Fairman's post-*Ahrens* scholarship demonstrates, it was in historical fact *that presence*, of the custodian to whom the writ is directed,

which was thought necessary to prevent an overreach of process.

The weight of extra-legislative history gives additional support to the conclusion that the Congress in 1866-67 was concerned with the location of the respondent to whom the writ would be directed rather than the location of the petitioner. Although the majority opinion in *Ahrens* concluded that the accepted view in 1867 was that the prisoner must be within the territorial limits of the court, relying on three cases discussed below,[6] Petitioner respectfully submits that this historical conclusion is incorrect and that it is unsupported by the case authority.

It is at least noteworthy that the *Ahrens* Court could rely on none of its own cases in its historical analysis. To the contrary, *Ex parte Endo*, 323 U.S. 283 (1944), decided by the Court only four years earlier, had indicated that the ability of the court to reach the custodian by process was the important issue,[7] although

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[6] *Ahrens v. Clark*, 335 U.S. at 191-192 citing *Ex parte Graham*, 4 Wash. C. C. 211, 10 F. Cas. 911 (No. 5,657) (C.C.E.D. Pa. 1818); *In re Bickley*, 3 F. Cas. 332 (No. 1,387) (S.D.N.Y. 1865); and cf. *United States v. Davis*, 5 Cranch C. C. 622, 25 F. Cas. 775 (No. 14,926) (D.C. Cir. 1839).

[7] *Endo* quoted in part with approval *In the Matter of Samuel W. Jackson*, 15 Mich. 416, 439-440 (1867) (Cooley, J.) in 323 U.S. at 306:

> The important fact to be observed in regard to the mode of procedure upon this writ is, that it is directed to, and served upon, not the person confined, but his jailer. It does not reach the former except through the latter. The officer or person who serves it does not unbar the prison doors, and set the prisoner free, but the court relieves him by compelling the oppressor to release his constraint. The whole force of the writ is spent upon the respondent . . .

the precise point decided in *Ahrens* had been reserved. *Endo* involved a petitioner removed from the district after filing; the respondent was within the district. The Court in *Endo* concluded that "the court may act if there is a respondent within reach of its process who has custody of the petitioner." 323 U.S. at 306. The Court held that the objective of granting a writ of habeas corpus to inquire into a restraint of liberty would be served "if a respondent who has custody of the prisoner is within reach of the court's process even though the prisoner has been removed from the district since the suit was begun." 323 U.S. at 307.

In *Jackson* the court unanimously held that the writ would not issue since respondent no longer had control of the prisoner, a minor child taken to Canada. The court was evenly split on whether the prisoner's absence also would have precluded relief. Contemporaneously with the 1867 Congressional action enacting the habeas corpus statute with the disputed phrase, Judge Cooley in *Jackson* came to the conclusion that the law at that time was that a writ of habeas corpus can be granted if one who has control of the prisoner is within the jurisdiction, no matter where the prisoner is held:

> I think the case presented by the petition is one in which we can give relief, and the decision in *United States v. Davis*, 5 Cranch C.C. 622, is in point, and will warrant it. There are no conflicting decisions. The incidental remarks which have been made in some cases about the remedy applying where the imprisonment is within the state, seem to me of no significance. In none of those cases was attention directed to this particular point, and I have already indicated my opinion that imprisonment, within the meaning of the law, may be held to be wherever the person is who imprisons. This writ is based upon no technical reasons, but its scope is as broad as its power to give redress. *In the Matter of Samuel W. Jackson*, 15 Mich. 416, 440 (1867) (Cooley, J.).

The three cases predating the statute that were cited by the Court in *Ahrens* to support the historical view that the petitioner must be within the territorial jurisdiction are, upon analysis, scant authority for that proposition. *Ex parte Graham*, 4 Wash. C.C. 211, 10 F. Cas. 911 (No. 5,657) (C.C.E.D. Pa. 1818), was quoted by the Court at 335 U.S. 191 n. 2. *Graham* was a habeas corpus action in which the jurisdiction of the court to issue that writ was not questioned; the *Graham* quote relied upon in the *Ahrens* opinion actually speaks to a deficiency in the arrest warrant rather than in the writ of habeas corpus. The issue in *Graham*, one of the Prize cases, was the reach of process issued by Chief Justice Marshall instructing federal marshals in several districts to take Graham or his property into custody. *Graham* involved interpretation of specific statutory authority granted in the Prize cases and discussed the reach of process in what was really a civil suit, not the Great Writ. *Graham* gives no historical authority to the proposition for which it was cited in *Ahrens*.

United States v. Davis, 5 Cranch C.C. 622, 25 F. Cas. 775 (No. 14,926) (D.C. Cir. 1839), stands as authority for the proposition that only the location of the respondent is dispositive. Indeed, *Davis* was relied upon as authority by Judge Cooley in *In the Matter of Samual W. Jackson*, 15 Mich. 416, 440 (1867), a leading expression of the proposition opposite to that for which *Davis* was cited in *Ahrens*. *Davis* involved a habeas corpus petition brought in behalf of three Negroes in the custody of respondent Davis. Davis' return to the writ was that the petitioners had been removed from the district before the writ had issued. The court held that it was sufficient that Davis was present and capable of producing the prisoners.

In re Bickley, 2 F. Cas. 332 (No. 1,387) (S.D.N.Y. 1865), is the only case lending some support to the *Ahrens* majority position. Even there, however, the basis of the decision is unclear. The basis may have been that the respondent was not proper, partly because he was a high-ranking military commander and the action was brought in the midst of the Civil War. Bickley was a civilian held in Boston in a military prison. He named General Dix as his custodian. Dix, who was in New York where the action was filed, was the general commandant of the entire area, but not the keeper of the prison where Bickley was held. The court in *Bickley* felt that its process could not operate in Massachusetts to open the prison doors there, indicating that perhaps Dix was the wrong respondent. The court was also extremely reluctant to assume any authority over General Dix and did not want to order him to travel about the country in time of war. *Bickley* is weak authority for the historical conclusion of the majority in *Ahrens*.

The summary of precedent extending to the time of the decision in 1948 given in the *Ahrens* opinion, 335 U.S. at 190, is also unconvincing. Seven lower court cases were said to speak for the *Ahrens* rule. Five of the seven were cases in which both the prisoner and custodian were outside the territorial jurisdiction of the court, and the two remaining cases[8] can be distinguished at least on the ground that their bases for decision are unclear, if not on the facts. *See Ahrens v. Clark*, 335 U.S. at 203 (Rutledge, J., dissenting). Mr. Justice Rutledge also cited lower court

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[8] *McGowan v. Moody*, 22 App. D.C. 148 (1903), and *In re Bickley*, 3 F. Cas. 332 (No. 1,387) (S.D.N.Y. 1865). *Bickley* is discussed *supra*. *McGowan* also involved a prisoner in military custody and the ground of the decision seems to be that the respondent, Secretary of the Navy, was not the proper custodian.

cases counter to the conclusion reached in *Ahrens*. 188 U.S. at 203 n. 17, 18.

Most commentators inquiring into the history of the matter have concluded that the generally accepted common law view is that it is enough for the custodian to be in the district. *See D. Meador, Habeas Corpus and Magna Carta* 42 (1966); Comment, *Habeas Corpus—Jurisdiction of Federal Courts to Review Jurisdiction of Military Tribunals when the Prisoner Is Physically Confined Outside the United States*, 49 Mich. L. Rev. 870, 871 (1951); *R. Sokol, Federal Habeas Corpus*, 87-88 (2d ed. 1969); and *Developments in the Law—Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1162 (1970).

Legislative history since *Ahrens* bespeaks neither approval nor disapproval of the *Ahrens* rule. The most recent amendments to the habeas statute came in 1966, before decision in *Peyton v. Rowe*, 391 U.S. 54 (1968), and *Smith v. Hooey*, 393 U.S. 374 (1969), the holdings of which multiplied the likelihood that a habeas petitioner would find himself located in a district different than that of the respondent against whom he should most logically complain.[9] It is not surprising, therefore, that the legislative history of the 1966 amendments speaks to quite different congressional concerns. The essential 1966 statutory change was the addition of section (d) to 28 U.S.C. §2241 permitting a state prisoner to bring a habeas action challenging the state sentence he is serving either in the district of his

[9] The logic and policy bearing on the question of the district most suitable to entertain a habeas petition under the particular circumstances (given requisite "custodial presence" in more than one district, see e.g. *Strait v. Laird*, ___ U.S. ___, 32 L. Ed. 2d 141 (1972)) will be discussed below.

confinement or in the district of the sentencing court.[10] This amendment was passed for two main reasons: (1) because an increasing number of applications for the writ were being filed which were flooding district courts where state prisoners were located and (2) because a greater proportion of cases required evidentiary hearings and the sentencing district was felt to be the more convenient location for conducting full and fair hearings. *See* H.R. Rep. No. 1894, 89th Cong., 2d Sess. 1-2 (1966) and S. Rep. No. 1502, 89th Cong., 2d Sess. 2 (1966) reporting favorably on identical legislation. Both reports explained that "recent Supreme Court decisions" changing the nature of habeas corpus action had caused the problem and the House Report cited specifically *Mapp v. Ohio*, 367 U.S. 643 (1961); *Gideon v. Wainwright*, 372 U.S. 335 (1962); and *Fay v. Noia*, 372 U.S. 391 (1963). H.R. Rep. No. 1894, 89th Cong., 2d Sess. 2 (1965); S. Rep. No. 1502, 89th Cong., 2d Sess. 2 (1966). These cases were also cited in the memorandum from the United States Committee on the Judiciary that was incorporated into each report. Additionally the

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[10] 28 U.S.C. § 2241(d) provides:

> Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

purpose section of each report refers to the amendment as dealing with habeas petitions from applicants "in custody under judgments and sentences of state courts." Thus this latest amendment dealt with one narrow class of petitioner only--those in state custody challenging the constitutional validity of their present sentences.

Petitioner and other petitioners similarly situated in either state or federal custody challenging convictions or indictments other than those they are presently serving were certainly not contemplated by the legislators amending §2241 in 1966; nor could they have been, as above stated, since only in 1968 when the Court decided *Peyton v. Rowe*, 391 U.S. 54 (1968), was the posture of Petitioner's case possible. However, the intention of the legislature was clearly to allow habeas corpus petitions to be entertained in the district where the records and witnesses are found and to leave venue flexible as justice and particular circumstances might require. In this respect, at the very least, *Ahrens* was disfavored and repudiated for one class of state habeas petitioner.

Recent constitutional history pertaining to related questions of habeas corpus jurisdiction accentuates the limits placed on the Writ by *Ahrens*. The circumstances in which the Great Writ is available have been expanded considerably since 1867, since 1948 when *Ahrens* was decided, and especially since 1966 when the latest amendments to 28 U.S.C. §2241 were enacted. In 1867 and for many years thereafter the writ of habeas corpus was used mainly to challenge the jurisdiction of the trial court. *See Moore v. Dempsey*, 261 U.S. 86 (1923), and *Johnson v. Zerbst*, 304 U.S. 458 (1939). Now the efficacy of the writ has been protected by an expansion of the range of constitutional inquiry. Not only are trial procedures scrutinized, but immediate release is not the

only relief available as was previously the case under *McNally v. Hill*, 293 U.S. 131 (1934). State prisoners now have a recognized right to a speedy trial and may challenge its denial; they are neither blocked by a prematurity rule in challenging its denial nor by the fact that they are serving a sentence in another jurisdiction. *Klopfer v. North Carolina*, 386 U.S. 213 (1967); *Peyton v. Rowe*, 391 U.S. 54 (1968); *Smith v. Hooey*, 393 U.S. 374 (1969).

It was not until the Court decided *Klopfer v. North Carolina*, 386 U.S. 213 (1967) that the right to a speedy trial on a state charge was held to be guaranteed by the Sixth and Fourteenth Amendments. The Court held that the "right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment," 386 U.S. at 223. In *Klopfer* the petitioner had complained that an outstanding indictment caused him present anxiety though he was not in custody, and the Court agreed. The speedy trial guarantee was held to encompass the right to pursue affirmative relief from outstanding untried state charges.

Soon after deciding *Klopfer*, this Court held that a state has a duty to attempt to bring an indictee to trial, even if he is serving a prison sentence imposed by another jurisdiction. *Smith v. Hooey*, 393 U.S. 374 (1969). The Court recognized that the protections afforded the basic demands of our criminal justice system by the guarantee of a speedy trial "are both aggravated and compounded in the case of an accused who is imprisoned in another jurisdiction," and compared the effects of a delay in bringing a prisoner to trial to the oppression suffered by a defendant held without bail on an untried charge. 393 U.S. at 378. The Court carefully detailed the deleterious effects of an outstanding untried charge and detainer on a

prisoner. The Court also recognized the increasing cooperation among the states themselves and between the state and federal government and disapproved the Texas court's having allowed "doctrinaire concepts of 'power' and 'authority' to submerge the practical demands of the constitutional right to a speedy trial." 393 U.S. at 381.

Although *Smith v. Hooey, supra*, involved a federal prisoner seeking trial on an untried state charge, the Court in its analysis of the effects on the prisoner, the duty of the state, and the cooperation among the states, made no differentiation between federal prisoners and state prisoners seeking such relief. Indeed, there is no reason for treating the two classes differently; and *Smith v. Hooey* can be said to have imposed a duty on state authorities to attempt to bring all accused prisoners to trial, no matter where they are incarcerated.

Prior to 1968, habeas corpus petitioners seeking a speedy trial would have been blocked by the prematurity rule of *McNally v. Hill*, 293 U.S. 131 (1934). But shortly prior to its 1969 decision in *Smith v. Hooey*, the Court in *Peyton v. Rowe*, 391 U.S. 54 (1968), extended to habeas petitioners the right to challenge future restraints, thereby expressly overruling *McNally*. In so doing, habeas corpus was extended by definition to petitioners complaining of restraint imposed by custodians not actually maintaining physical custody at the time relief is sought. The *Peyton* Court noted in 391 U.S. at 59 that 28 U.S.C. §2241 does not attempt to define the words "in custody" and concluded that the words should be given broad meaning. Similarly, Petitioner argues that the statute does not itself define the companion language "within their respective jurisdictions"; those words also should be given broad meaning "consistent with the

canon of construction that remedial statutes should be liberally construed." *See Peyton v. Rowe*, 391 U.S. at 65.

Peyton v. Rowe and *Smith v. Hooey* are only recent examples of movement away from doctrinaire jurisdictional analysis. *Jones v. Cunningham*, 371 U.S. 236 (1962), freed the writ from outdated notions regarding the amount of custody required for jurisdictional purposes when it permitted habeas corpus relief to a petitioner who had been paroled. Further, *Jones* reaffirmed *Ex parte Endo*, 323 U.S. 283, 304 (1944), in holding that jurisdiction was not lost when petitioner was removed from the district (North Carolina had paroled Jones to Georgia) after filing his petition . The *Jones* Court reiterated the *Endo* view that it is the court's ability to reach the respondent, to whom the writ flows, that is essential and not the location of petitioner. The Court in earlier cases did not allow the absence of Petitioner from all federal districts to preclude jurisdiction in habeas corpus actions, the wording of the statute notwithstanding. *Hirota v. MacArthur*, 338 U.S. 197 (1948); *United States ex rel Toth v. Quarles*, 350 U.S. 11 (1955); *Burns v. Wilson*, 346 U.S. 137 (1953). The most recent example of an abjuration of a rigid construction of the jurisdictional requirement of "custody" is *Strait v. Laird*, ___ U.S. ___, 32 L.Ed.2d 141 (1972) a case in which this Court refused "to exalt fiction over reality" in the identification of sufficient custodial presence in the forum state there chosen.

Ahrens stands in sharp contrast to the many decisions which lower, rather than raise, rigid jurisdictional barriers by force of statutory construction. The decision would stand as a mere anomaly were it not for its effect on decisions extending available modes of relief and

construing requisite "custody." Such decisions necessarily contemplate circumstances in which a habeas petitioner will be confined in a judicial district other than that which territorially embraces the "real respondent in interest" against whom he is complaining.

Different than the Congress, the lower federal courts have had numerous opportunities subsequent to *Peyton v. Rowe* to ponder the continuing vitality of the *Ahrens* rule. Although the circuit courts of appeals are badly split on the issue,[11] many of the opinions share a common attribute: an expression of disagreement with the effect of the rule and a desire for an authoritative resolution of the jurisdictional confusion. *See, e.g., White v. Tennessee*, 447 F.2d 1354 (6th Cir. 1971) and *United States ex rel. Fisher v. Pennsylvania*, 314 F. Supp. 1329 (E.D. Pa. 1970). In this respect the judges join the commentators. *See e.g.*, Tuttle, *Catch 2254: Federal Jurisdiction and Interstate Detainers*, 32 U. Pitt. L. Rev. 489 (1971); Wexler & Hershey, *Criminal Detainers in a Nutshell*, 7 Crim. L. Bull. 753 (1971); Comment, *Towards a Solution of the Jurisdictional Problem in Multi-state Federal Habeas Corpus Actions Challenging Future Restraints*, 1970 Utah L. Rev. 625; and Comment, *The Custody Requirement and Territorial Jurisdiction in Federal*

[11] See addendum to Braden's Petition for a Writ of Certiorari, filed April 15, 1972, for a catalog of circuit positions. Some courts feel that both the district of detention and the district lodging the detainer have jurisdiction but the district lodging the detainer is strongly preferred (e.g. *Word v. North Carolina*, 406 F.2d 352 (4th Cir. 1969)); others hold that the district lodging the detainer has no jurisdiction because of *Ahrens* (e.g., *White v. Tennessee*, 447 F.2d 1354 (6th Cir. 1971)); others have found that the district lodging the detainer is the only proper one (e.g., *Rodgers v. Louisiana*, 418 F.2d 237 (5th Cir. 1969)).

Habeas Corpus, 118 U. Pa. L. Rev. 429 (1970). Wexler & Hershey suggest that when *Ahrens* is used to deny access to the writ to a petitioner otherwise validly seeking habeas relief, it could be interpreted as a suspension of the writ of habeas corpus, as prohibited by the Constitution. 7 Crim. L. Bull. at 774-775 n. 109. *See also, Developments in the Law—Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1263 (1970). Others have criticized *Ahrens* itself for its overly restrictive views of jurisdiction. *See R. Sokol, Federal Habeas Corpus*, 85-88 (2d ed. 1969) and Fairman, *New Problems of the Constitution Following the Flag*, 1 Stan. L. Rev. 587, 632 (1949).

Word v. North Carolina, 406 F.2d 352 (4th Cir. 1969) (en banc), is one of the leading cases which articulates the view that *Ahrens* does not require strict application of the "territorial jurisdiction" rule in cases in which an out-of-state detainer is under attack. In *Word*, the United States Court of Appeals for the Fourth Circuit affirmed a district court decision that Virginia prisoners who were also convicted of offenses in North Carolina (which state had lodged detainers with Virginia prison officials) should seek habeas corpus relief in a North Carolina federal district court and not a Virginia federal district court. The court reasoned that since North Carolina was the "custodian" for purposes of the detainer, North Carolina was the proper place to bring the action. The court was persuaded that, in spite of the fact that the detainer was filed in Virginia and that the prisoner was confined there, the merits raised by the petitioner went to the validity of a North Carolina judgment. The records and witnesses of both parties were in North Carolina and North Carolina's Attorney General had to defend his state's action. Since Virginia was unconcerned with the outcome of the case

while North Carolina had much at stake, the Fourth Circuit felt compelled to look beyond immediate physical custody. In reaching its result the *Word* court concluded at 359:

> ... if the words "within their respective jurisdictions" in §2241 mean anything more than that the court may act only if it has personal jurisdiction of the proper custodian and capacity, within its geographic boundaries, to enforce its orders, physical presence of the petitioner within the district is not an invariable jurisdictional prerequisite. It gives way in the face of other considerations of fairness and strong convenience.

The same court reached the conclusion that a prisoner seeking a speedy trial in another state can petition for relief in the district where the trial is sought. *Kane v. Virginia*, 419 F.2d 1369 (4th Cir. 1970).

Another leading case which follows the *Word* rationale is *United States ex rel. Meadows v. State of New York*, 426 F.2d 1176 (2d Cir. 1970), in which the United States Court of Appeals for the Second Circuit affirmed a district court decision holding that the proper court in which a Georgia prisoner should seek relief from a New York detainer was New York. The court distinguished *Ahrens* by stating at 1181:

> Therefore, despite the general language of the opinion, the precise holding of *Ahrens* applies only to the jurisdiction of the district courts in habeas corpus proceedings commenced by petitioners seeking immediate release from confinement.

The *Meadows* court refused "to extend *Ahrens* to a class of habeas corpus petitioners who did not exist at the time

the Supreme Court decided *Ahrens*, petitioners who demand not an immediate release from physical confinement but the withdrawal of a potential restraint on future liberty." 426 F.2d 1176 at 1182.

It is instructive to consult the *Ahrens* dissent of Justice Rutledge and compare *Meadows* as a measure of the extent to which this new class of petitioners necessitates a rethinking of forum appropriateness. Although formulating a rule that would permit a petitioner to petition outside the district in which he is confined, Justice Rutledge cautioned that "their absence from the district is a circumstance which normally would induce the court to exercise its discretion to decline jurisdiction, but which may be disregarded in exceptional circumstances . . ." 335 U.S. at 202. *Meadows* also contemplates jurisdiction lying in more than one district, but from its post-*Peyton v. Rowe* vantage the court could delineate a variety of now unexceptional circumstances in which the place of confinement is the least appropriate forum, particularly when the challenge is to a future restraint. No better example of these circumstances need be contrived than the case at bar. It is Kentucky, where Petitioner filed his habeas petition, in which the subject indictment is outstanding and from which a detainer has issued. Accordingly, the district court below, before whom Petitioner prevailed, found jurisdiction to be appropriate "[s]ince it is the State of Kentucky which must take action" (App. 9). It is Kentucky officials, not the Alabama prison warden, who have the real interest in Petitioner's claims and who will surely defend on the merits of Petitioner's claims, no matter where brought. Moreover, transportation of the prisoner or other witnesses from outside the chosen forum state is demonstrably not a factor here; Petitioner presents a

claim which, not untypically, can be—and was—decided as a matter of law on the Kentucky (not Alabama) files and records without an evidentiary hearing. In addition, it is Kentucky's remedies that Petitioner must exhaust under 28 U.S.C. §2254 since he complains of the Kentucky indictment only. It is in Kentucky that he must demand the speedy trial, as he did here. Such demands must conform to local procedure, for there is no standard demand procedure; and the way is more often perplexing than clear. *See* Wexler & Hershey, *Criminal Detainers in a Nutshell*, 7 Crim. L. Bull. 753, 760-762 (1971). This problem is acute since the Court has not enunciated with particularity what a petitioner must do to satisfy the demand requirements. Certainly a local district court judge is better equipped to decide whether sufficient and correct demand has been made to the proper parties than a judge in a foreign state where petitioner happens to be incarcerated.

All of these factors—the nature of the issue presented, the proof to be adduced, the respective evidentiary burden to be borne by each party (if any), the relief sought, the place of exhaustion of remedies, the interest of the named respondent—should properly weigh in the choice of forum. Petitioner has shown above that the legislative history of the statute reflects concern over issuance of process by an appropriate court to an appropriate respondent. The analysis here urged supports rather than derogates from that important concern, a concern of more than modest proportion in our federal system. Given the contemporary range of inquiry under the writ, the turnkey at hand may be the least appropriate respondent against whom the writ should issue, and the district court which territorially embraces the jailhouse may be the least appropriate court to exercise the vast power implicit in the writ.

Petitioner hastens to add that he does not thereby argue that the district of confinement is *per force* without concurrent jurisdiction. *Strait v. Laird*, ___ U.S. ___, 32 L.Ed.2d 141 (1972) teaches that there may be sufficient custodial presence in more than one district upon which jurisdiction may be predicated and against which process may be issued. Circuit courts addressing themselves to the question have concluded that each such district could exercise jurisdiction, *see United States ex rel. Meadows v. State of New York*, 426 F.2d 1176, 1183 n. 8 (2d Cir. 1970), *Word v. North Carolina*, 406 F.2d 352, 357 n. 6 (4th Cir. 1969), subject to the important qualifications inherent in familiar convenience of forum standards.

United States ex rel. Meadows, supra, develops at length the appropriateness of utilizing 28 U.S.C. §1404(a) to effect needed transfer. 406 F.2d at 1183, n. 9. The *Meadows* court concluded that since habeas corpus proceedings are civil in nature, they are subsumed under the phrase "any civil action" of 28 U.S.C. §1404(a), citing *Webb v. Beto*, 362 F.2d 105 (5th Cir. 1966), *cert. denied*, 385 U.S. 940 (1966). On the facts of *Meadows* the court found that the petition "might have been brought" in either a Georgia or New York district court. Similarly, Petitioner here argues that although he "might have brought" his petition in either an Alabama or Kentucky district court, he should nonetheless not be denied his forum choice given its appropriateness by the measure of 28 U.S.C. §1404(a), "for the convenience of parties and witnesses and in the interest of justice", nor should the district court be reversed in either its jurisdictional decision or its judgment on the merits. In sum, the district court below engaged in a valid exercise of its statutory discretion in a case in which a proper

party respondent was before it under convenient circumstances serving the interest of justice. Neither 28 U.S.C. §2241 nor 28 U.S.C. §1404(a) require more; nor should a rigid application of *Ahrens v. Clark* deny petitioner his already abundantly constrained jurisdictional choice. Such a holding would work an invariable restriction which, in its myriad applications, would seriously hinder the efficient administration of a burgeoning habeas corpus case-load and serve neither petitioners, respondents, trial judges, nor the interest of justice. Neither the language, the history, nor the purpose of the habeas statute require such a result.

CONCLUSION

Petitioner asks that the decision of the United States Court of Appeals for the Sixth Circuit be reversed and that the case be remanded with instructions to enter judgment upon the opinion and order of the United States District Court for the Western District of Kentucky made and entered on February 26, 1971.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this day of , 1972, three copies of the Brief for Petitioner were mailed, air mail postage prepaid, to John M. Famularo, Assistant Attorney General, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601, Counsel for Respondent. I further certify that all parties required to be served have been served.

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